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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Respondent.

On Appeal from the Supreme Court of the State of Wisconsin

JURISDICTIONAL STATEMENT

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OPINION BELOW

The decision of the Wisconsin Supreme Court has been reported in 23 Wis. (2d) 407, 127 N.W. (2d) 15, and is appended hereto (App. A, *infra*, pp. 1-7).

JURISDICTION

The appellant was charged with the offense, defined in §26.06(2) of the Wisconsin Statutes, of removing seizure notices of the Wisconsin State Conservation Department from decked pulpwood cut on lands entered as Forest Crop Lands under Chapter 77, Wisconsin Statutes. Appellant was convicted by the County Court for Vilas County, Wisconsin. Judgment of conviction was affirmed by the Vilas County Circuit Court, and again affirmed by the Wisconsin Supreme Court by decision entered March 31, 1964. Appellant's motion for rehearing was denied on June 2, 1964. Notice of appeal was filed in the Circuit Court of Vilas County, Wisconsin, on August 27, 1964.

In affirming appellant's conviction of unlawfully removing seizure notices, the Wisconsin Supreme Court determined that the pulpwood on which said seizure notices had been placed had been cut from county-owned lands still entered under the Wisconsin Forest Crop Law. In support of this determination, the Wisconsin Supreme Court ruled that the enactment of §28.12, Wis. Stats., and the 1959 amendment of §77.10(2)(a), Wis. Stats., were not an unconstitutional impairment of the obligations of contracts prohibited by Article I, Section 10 of the United States Constitution. In so doing, the Wisconsin court held that a statutory contract had been created between the State and Vilas County by virtue of the county's entry of its lands under the terms of Chapter 77, Wis. Stats., but that §28.12, Wis. Stats., and the 1959 amendment of §77.10(2)(a), Wis. Stats., subsequently deprived the County of the withdrawal rights provided by such statutory contract.

§§77.03, 77.10(2)(a) and 28:12, Wisconsin Statutes, 1961, are appended hereto (App. D, *infra*, pp. 17-19).

The jurisdiction of this Court to review by direct appeal from the Wisconsin Supreme Court is conferred by 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether a state which has chosen to deal with its own political subdivisions on a contractual basis may unilaterally alter or abrogate the terms of an express statutory contract with such a subdivision by subsequent legislation, where such action supports the criminal conviction of a private citizen.

STATEMENT OF THE CASE

From time to time during the years 1933 to 1945, Vilas County, Wisconsin, as an owner of forest lands, entered the same under the Forest Crop Law, Chap. 77, Wisconsin Statutes. Entry was made pursuant to §77.03, Wis. Stats., which provided that such entry

> "shall constitute a *contract between the state and the owner* . . . whereby the state *as an inducement to owners* and prospective purchasers of forest crop lands to come under this chapter agrees that . . . *no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands*, except as the conservation commission and the owner may expressly agree in writing." (Emphasis supplied)

At all times between 1933 and 1945, said Chap. 77, Wisconsin Statutes, and particularly §77.10(2)(a) thereof, permitted a county to withdraw its lands by simply filing a declaration of withdrawal, no payment by the county to the state being required to render such withdrawal effective.

In 1947, subsequent to Vilas County's entry of the lands in question, §28.12 of the Wisconsin Statutes was first enacted, prescribing procedures which should be followed by counties withdrawing forest crop lands for purposes of sale, and requiring certain payments by the county to the state when the sale was to be made to any purchaser other than the state or any local unit of government.

In 1959, §77.10(2)(a) of the Wisconsin Statutes was amended by addition of the following sentence:

> "A county may withdraw county-owned lands from this chapter under s. 28.12."

In 1961, Vilas County filed its declaration of withdrawal (R. 10) of all county-owned lands, which had been entered under the Forest Crop Law prior to 1947. Appellant, as County Forester for Vilas County, informed the Wisconsin Conservation Commission by letter (R. 11), that such lands were not being withdrawn for purposes of sale.

Thereafter, Vilas County entered into timber sale agreements with private persons, who cut timber on said county-owned lands pursuant to such agreements. The Wisconsin Conservation Department then placed seizure notices on such cut timber, pursuant to its purported authority, under §26.06(1) of the Wisconsin Statutes, to seize timber cut from "forest crop lands entered under the provisions of Chapter 77." Appellant removed eight of such seizure notices and was charged with violating §26.06(2) of the Wisconsin Statutes, which makes it unlawful for any person to remove the seizure notices authorized by §26.06(1).

The essential facts, including appellant's removal of the seizure notices, were stipulated (R. 3) to the County Court for Vilas County, Wisconsin, and the case was tried by that court upon such stipulated facts and appellant's motion to dismiss. The motion to dismiss (R. 2) contended that there was no violation of law in removing such seizure notices, since they had been placed on timber cut from lands which Vilas County had previously withdrawn from the Forest Crop Law by procedures guaranteed to be effective in the county's statutory contract with the state, and the Wisconsin Conservation Department therefore had no

authority to seize the cut timber. The county court entered judgment convicting appellant of the offense charged, on the ground that the county's previously existing right of withdrawal had been abrogated by subsequent enactment of §28.12 and the 1959 amendment of §77.10(2)(a), Wis. Stats., so that the county's attempted withdrawal was ineffective, and the lands therefore were still entered under the Forest Crop Law when the timber was cut. The Memorandum Opinion of the County Court is appended hereto (App. B, *infra*, pp. 8-10).

Appellant appealed to the Circuit Court for Vilas County. It was stipulated (R. 16) that the circuit court should decide the case on the record and motion to dismiss made in the county court. The circuit court affirmed the judgment of conviction, again deciding that application of the Wisconsin Statutes to deprive the county of its previously existing right of withdrawal was valid, notwithstanding provisions of the Wisconsin and United States constitutions prohibiting legislative impairment of the obligations of contracts. The Memorandum Opinion of the Circuit Court, dated June 7, 1963, is appended hereto (App. C, *infra*, pp. 11-16).

Appellant then appealed to the Wisconsin Supreme Court which, by its decision entered March 31, 1964, again upheld the conviction. While recognizing that §77.03, Wis. Stats., had expressly given Vilas County a right, under statutory contract with the state itself, to effect a withdrawal of its lands by the procedures which the county actually followed, the Wisconsin Supreme Court held that the Wisconsin legislature had effectively deprived the county of its pre-existing right through statutory amendment. The court said (23 Wis. (2d) 412; App. A, *infra*, pp. 4-5):

"The defendant also claims that the county had a contractual right under the pre-existing statutes of the Forest Crop Law, which right was constitutionally inviolable. We recognize that the language of sec. 77.03, Stats., on its face appears to support the defendant's contention. . . . [quotation of statute omitted]

"Notwithstanding the above-quoted statute, we are obliged to conclude that the legislature was not legally bound by it. The law is clear in Wisconsin that the legislature, in its relationship with municipal or quasi-municipal corporations of the state, is not obliged to heed prior legislative expressions."

This decision was based on the ground that the county, as a creature of the state, enjoys no constitutional protection against state legislation impairing the obligations of contracts, under the rule of *Hunter* v. *Pittsburgh* (1907), 207 U.S. 161, 178, 179, 28 Sup. Ct. 40, 52 L. Ed. 151, and related cases. Thus the Wisconsin Supreme Court stated (23 Wis. (2d) 414; App. A, *infra*, p. 7):

"Since the lands from which the seized logs were cut had never validly been withdrawn from entry under the Forest Crop Law, we conclude that the defendant was properly convicted of a violation of sec. 26.06(2), Stats., for his unlawful removal of the seizure notices."

THE QUESTION IS SUBSTANTIAL

This appeal presents an issue which has never been decided by this Court or, so far as we can determine, by any court in the land except in the instant case. The Wisconsin Supreme Court, and the circuit and county courts of Vilas County, conceived the issue to be the same as that decided in *Hunter* v. *Pittsburgh*, *supra*, and related cases. But the issue in such cases is only similar to, not the same as, the

issue in this case. The distinction was clearly recognized in *Gomillion* v. *Lightfoot* (1960), 364 U.S. 339, 81 Sup. Ct. 125, 128, which noted that *Hunter* v. *Pittsburgh* involved no express or implied contract between the state and its political subdivision, and that it is authority "only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities *solely as a result of their relationship.*" (Emphasis supplied) In the instant case, on the other hand, we do have an express statutory contract between the state and such subordinate governmental entity. And we have a conviction of a private citizen which rests upon the impairment of the obligations of such statutory contract by subsequent state legislation.

The issue here is also similar to, though not precisely the same as the issue decided by this Court in such cases as *James Hall* v. *State of Wisconsin* (1880), 103 U.S. 5, 26 L. Ed. 302, *Dodge* v. *Board of Education* (1937), 302 U.S. 74, 58 Sup. Ct. 98, 82 L. Ed. 57, and *State of Indiana ex rel. Anderson* v. *Brand* (1938), 303 U.S. 95, 58 Sup. Ct. 443, 82 L.Ed. 685. In such cases, this Court was not faced with the question whether a subordinate governmental entity enjoyed constitutional protection against impairment of its contracts by the state, but whether public employees should be so protected. In each case this Court distinguished between mere privileges of employment, granted by statute and revocable at the state's will by subsequent legislation, and statutory *contract* rights in the terms of employment, which this Court held could not be so impaired.

The issue here has been foreshadowed, though not decided, by dicta in *Gomillion* v. *Lightfoot, supra,* and

Graham v. *Folsom* (1906), 200 U.S. 248, 26 Sup. Ct. 245, 50 L. Ed. 464. As Justice Frankfurter said in *Gomillion* (81 Sup. Ct. 128-129):

> "... The Hunter opinion itself intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by the municipal corporations, 207 U.S. at 171-181 ...."
>
> "This line of authority conclusively shows that the *Court has never acknowledged* that the States have power to do as they will with municipal corporations regardless of consequences, *Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution* ...."
>
> "The observation in *Graham* v. *Folsom*, 200 U.S. 258, 26 S. Ct. 245, 50 L. Ed. 464, becomes relevant:
>
> > '.... such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States *which forbids a state from passing any law impairing the obligation of contracts*' ...." (Emphasis supplied)

This appeal presents this Court for the first time with the opportunity to eliminate the *tertium quid*, namely, whether a state may constitutionally abrogate its own statutory contract with a subordinate governmental entity regardless of the consequences this may have upon the rights of private citizens. We submit that this question is vitally important to the clear definition of state responsibility and power.

CONCLUSION.

The appeal presents a substantial question of public importance within the jurisdiction of this Court. We request that it be scheduled for briefs and oral argument.

Respectfully submitted,

EDWARD D. CLEVELAND,
Attorney for Anthony Mutter,
Appellant

WHYTE, HIRSCHBOECK, MINAHAN,
HARDING & HARLAND
Of Counsel

September , 1964.

APPENDIX A

Decision of Wisconsin Supreme Court dated March 31, 1964 as Reported in 23 Wis. (2d) 407

APPEAL from an order of the circuit court for Vilas County:

BRUCE F. BEILFUSS, Circuit Judge of the Seventeenth circuit, Presiding. AFFIRMED.

The defendant appeals from an order of the circuit court for Vilas county which denied the motion of the defendant to dismiss the criminal complaint, such order also having the effect of affirming a judgment of the county court which convicted the defendant for violation of sec. 26.06(2), Stats. A criminal complaint had been made on January 4, 1962, by the district attorney of Vilas county against the defendant, Anthony Mutter. The complaint charged the defendant with unlawfully removing eight seizure notices of the state conservation commission, a violation of sec. 26.06(2).

The record includes a stipulation of facts entered into for the purpose of the trial in the county court. According to the stipulation, Vilas county, in its proprietary capacity as a body corporate and political subdivision of the state, was the owner of certain lands. Between certain specified dates from 1933 to 1945, such lands were formally entered as forest crop lands pursuant to the Forest Crop Law, ch. 77, Stats.

The defendant, Anthony Mutter, was appointed as the Vilas county forester with the approval of the county board on November 13, 1957. Pursuant to a Vilas county order of November 10, 1953, the Vilas county forester has the general duty to administer all county lands entered under the Forest Crop Law.

On August 3, 1961, the Vilas county board sent a declaration of withdrawal of said lands as forest crop lands to the Wisconsin conservation commission. On September 21, 1961, Mutter, as county forester, sent a letter to the director of the Wisconsin conservation department. The purpose of the letter was to reaffirm the Vilas county declaration of withdrawal of all Vilas county owned lands from under the Forest Crop Law effective September 30, 1961. The letter stated that Vilas county was not withdrawing these lands for purposes of sale and that as a result sec. 28.12, Stats., did not apply.

On October 5 and 12, 1961, pursuant to authority of the Vilas county forestry and land committee, Mutter caused to be published in the Vilas County News-Review an advertisement of timber sales with respect to the lands described in the stipulation. Mutter entered into timber-sale agreements on behalf of the county with four named persons, such contracts being entered into on October 2, 1961, and on November 18, 1961. Cutting and removal operations were commenced in furtherance of timber-sale agreements on all of the lands described.

After the start of cutting and removal of the timber, between December 19 and 21, 1961, the Wisconsin conservation commission caused tags to be attached to decked pulpwood so cut under said agreements on the land described. On December 24, 1961, Mutter removed eight of such tags from decked pulpwood on three of the parcels of land described in the stipulation. It is this act of removing the eight tags that constituted the offense for which the defendant stands convicted.

Mutter gave an affidavit dated May 17, 1962, which was also made part of the record when the case was before the Vilas county court. The affidavit reiterates the general nature of the duties of the defendant. An additional stipu-

lation was entered into by Mutter's attorney and the Vilas county district attorney on October 8, 1962, which provided that on the appeal to the circuit court the said circuit court could utilize the record and stipulation from the county court. It was further stipulated that the circuit court could decide the issues on the record, papers, and proceedings filed in the county court.

The sentence, if any, imposed in the county court is not given, but sec. 26.06(2), Stats., provides that the punishment for a violation shall be as provided in sec. 26.15. The latter section provides that a violation shall constitute a misdemeanor and that punishment shall be by a fine of not less than $10 or more than $50, or by imprisonment in the county jail for not less than ten days or more than thirty days, or by both fine and imprisonment.

In the order appealed from, dated September 23, 1963, it was noted that in the circuit court the case was decided on the record which was made in the county court with no additional hearing in the circuit court.

For the appellant there were briefs by *Edward D. Cleveland*, attorney, and *Whyte, Hirschboeck, Minahan, Harding & Harland* of counsel, all of Milwaukee, and oral argument by *Mr. Cleveland*.

For the respondent the cause was argued by *Roy G. Tulane*, assistant attorney general, with whom on the brief was *George Thompson*, attorney general.

Gordon, J. This case presents a difficult problem in the construction of statutory law and brings to mind the comment attributed to Lord Coke:

> "If it be common law, I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately."
>
> —Woolryen, Life of Coke, page 197

As the defendant analyzes the statutory history of the Forest Crop Law, he draws the conclusion that Vilas county was legally entitled to withdraw its lands from the state program. He bases this conclusion on the provisions of ch. 77, Stats., and particularly sec. 77.03, which the defendant urges was the controlling section at the time that Vilas county entered its lands. Such entry occurred before the enactment of ch. 195, Laws of 1959, and there is not much doubt that prior thereto a county could withdraw its forest crop lands for purposes other than sale without reimbursement to the state.

Since the amendment in 1959, sec. 77.10(2)(a), Stats., provides that, "A county may withdraw county-owned lands from this chapter under s. 28.12." The latter section, which had been enacted in 1947, required reimbursement to the state and set up a formal procedure to be observed by the county board in connection with a withdrawal. The defendant argues that the 1959 change was not intended to present an exclusive means by which a county could withdraw its lands. We, however, are not able to adopt the defendant's construction. Our interpretation of the statutory language requires the conclusion that the 1959 amendment is aimed at all proposed withdrawals of county-owned lands. Accordingly, the contemplated withdrawal on the part of Vilas county required that such county follow the provisions of sec. 28.12.

The defendant also claims that the county had a contractual right under the pre-existing statutes of the Forest Crop Law, which right was constitutionally inviolable. We recognize that the language of sec. 77.03, Stats., on its face appears to support the defendant's contention. The language of the statute, in part, is here quoted:

"The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner, running with said lands, for a period of fifty years, unless terminated as hereinafter provided, with privilege of renewal by mutual agreement between the owner and the state, whereby the state as an inducement to owners and prospective purchasers of forest crop lands to come under this chapter agrees that until terminated as hereinafter provided, no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands, except as the conservation commission and the owner may expressly agree in writing."

Notwithstanding the above-quoted statute, we are obliged to conclude that the legislature was not legally bound by it. The law is clear in Wisconsin that the legislature, in its relationship with municipal or quasi-municipal corporations of the state, is not obliged to heed prior legislative expressions. Thus, the legislature by statute can take away from a municipality what it has previously given to it by statute. *Madison Metropolitan Sewerage Dist.* v. *Committee* (1951), 260 Wis. 229, 242, 50 N.W. (2d) 424. We recently expressed a related concept in *Ashwaubenon* v. *Public Service Comm.* (1963), 22 Wis. (2d) 38, 125 N.W. (2d) 647, when we pointed out that fixed and vested rights are not obtained in connection with a waterway intrusion which had been authorized by the legislature. At page 49 of the *Ashwaubenon Case*, we said:

"It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount and the rights of others are subject to revocation at the pleasure of the legislature."

This court has often said that a municipal corporation does not have a vested right in an enactment of the legis-

lature. The state retains the inherent power to redefine the relative rights of the county in the forest crop program.

The right of a county to challenge acts of the legislature is sharply restricted. *State ex rel. Martin* v. *Juneau* (1941), 238 Wis. 564, 571, 300 N.W. 187. This view is based on the fact that the county is a creature of the state and exists in large measure to help handle the state's burdens of political organization and civil administration. We recognized this concept in *School Dist.* v. *Callahan* (1941), 237 Wis. 560, 570, 297 N.W. 407, wherein we quoted from *Hunter* v. *Pittsburgh* (1907), 207 U.S. 161, 178, 179, 28 Sup. Ct. 40, 52 L. Ed. 151:

> " 'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.' "

We reached a comparable conclusion in the recent case of *Columbia County* v. *Wisconsin Retirement Fund* (1962), 17 Wis. (2d) 310, 317, 116 N.W. (2d) 142. See also *Douglas County* v. *Industrial Comm.* (1957), 275 Wis. 309, 81 N.W. (2d) 807; *State ex rel. Bare* v. *Schinz* (1927), 194 Wis. 397, 216 N.W. 509.

Since the lands from which the seized logs were cut had never validly been withdrawn from entry under the Forest Crop Law, we conclude that the defendant was properly convicted of a violation of sec. 26.06(2), Stats., for his unlawful removal of the seizure notices.

By The Court. —Order affirmed.

BEILFUSS, J., took no part.

APPENDIX B

STATE OF WISCONSIN COUNTY COURT VILAS COUNTY

In the Matter of the
STATE OF WISCONSIN
v.
ANTHONY MUTTER

MEMORANDUM OPINION

The above matter had come before the County Court for Vilas County, George Sullivan, acting County Judge, on the 9th day of May, 1962; appearing in person was the defendant Anthony Mutter, and also Edward D. Cleveland, defendant's attorney, of the firm of Whyte, Hirschboeck, Minahan, Harding & Harland; representing the State of Wisconsin was Calvin A. Burton, District Attorney. The defendant through his attorney has filed a *Motion to Dismiss Complaint* as a matter of law on the grounds, *first*, that the lands upon which the timber products were cut had been effectively withdrawn as forest crop lands pursuant to s. 77.10(2)(a), Wis. Stats., and, *second*, that neither the Conservation Commission, nor any other agency of the State, had the authority to place such tags upon such timber products because the products were on lands withdrawn from entry under the forest crop law.

The District Attorney for Vilas County in reply insists, in effect, that the defendant Anthony Mutter is estopped from raising the issue of the legality of the withdrawal of these lands from entry under the forest crop law as a defense in the instant criminal matter because said defendant, as an individual, does not have a sufficient legal interest in said lands to raise such a defense.

There is no doubt in the mind of the Court that the defendant is fully within his rights to raise the issue as a matter of law that he did nothing illegal in removing the aforesaid eight seizure notices because these notices had not been legally placed on the timber in question because the lands involved had already been properly withdrawn from entry under the forest crop law. That right he unquestionably has.

The County Court finds as follows in regard to the two basic issues raised by the attorney for the defendant Mutter:

The Question of Whether Said Lands Had Been Legally Withdrawn from Entry.

The Court finds that said lands had not been effectively withdrawn from entry under the Forest Crop Law.

The amendment to the Forest Crop statutes, by Chapter 195, Laws of Wisconsin, established a procedure for withdrawal of these forest crop lands. The sentence: "A county may withdraw county-owned lands from this chapter under s. 28.12." establishes a procedure for said withdrawal.

The contention of defendant and his attorney is that such amendment is of no force and effect as it applies to lands entered under the forest crop act prior to the enactment of this amendment, since it would alter a "contract" between the county (here Vilas County) and the State of Wisconsin.

The Court finds that Vilas County here in its management of forest crop lands is acting as an "arm of the State" as expressed in *State ex rel Martin* v. *Juneau*, 238 Wis. 564, and the later amendment to the Forest Crop law has been effective in changing the terms under which the forest crop lands were held. The forest crop law is

purely statutory and the intent of the legislature was to provide for reimbursement to the State for moneys advanced prior to withdrawal of lands, regardless of for whatever purpose. A County cannot object to a change in the rights and powers conferred on it by the original forest crop law.

Whether The Seizure Notices Were Legal Seizure Notices.

It also follows then based on the above finding that the notices attached by the State were legal seizure properly attached.

The Court, therefore, denies the *Motion to Dismiss* by defendant's attorney and is prepared to set a time for trial for defendant.

By The Court:
(s) *George Sullivan*
Acting County Judge

APPENDIX C

STATE OF WISCONSIN IN CIRCUIT COURT FOR VILAS COUNTY

STATE OF WISCONSIN,
Plaintiff,
v.
ANTHONY MUTTER,
Defendant.

MEMORANDUM OPINION

Hon. BRUCE F. BEILFUSS, Circuit Judge presiding.

Appearances:

For the State:
JOHN W. REYNOLDS, Attorney General,
by JOHN H. BOWERS, Assistant Attorney General.

For the Defendant:
WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND,
735 N. Water Street, Milwaukee, Wisconsin,
by EDWARD D. CLEVELAND

Upon stipulated facts the defendant was found guilty of a violation of sec. 26.06(2) Wis. Stats., a misdemeanor, by the County Court of Vilas County, the Honorable George Sullivan, acting County Judge. The defendant has appealed to this, the Circuit Court for Vilas County, Wisconsin.

The parties, by their respective counsel, have stipulated that the court may determine the issue upon the record, including the stipulation of facts, and upon all records and proceedings, including the briefs filed in County Court and affidavits submitted subsequent thereto.

The issues are presented to the court in the form of a motion to dismiss the complaint.

The principal problem involved is a question of the validity of a 1959 amendment to the Forest Crop Law.

The complaint alleges in part that the defendant, Anthony Mutter, did on or about the 20th day of December, 1961, unlawfully remove eight seizure notices of the State Conservation Commission, contrary to sec. 26.06(2) of the Wisconsin Statutes.

The defendant, Anthony Mutter, was appointed county forester for Vilas County in November, 1957, and has acted in that capacity since that time. The County Board also created a Forestry and Land Committee to "administer all county lands entered under forest crop and all of the lands of Vilas County Forest reserve and . . . all other lands owned by Vilas County", and to have ". . . supervision of the administration use or disposition of all county owned lands, forest and forest products." The county forester is employed by the county pursuant to authority of the committee subject to approval of the county board.

The lands in question were entered as Forest Crop Lands pursuant to Chapter 77, Wis. Stats., and resolutions of the county board between the years 1933 to 1945.

On August 3, 1961, pursuant to its resolutions, the county board sent to the Wisconsin Conservation Commission a Declaration of Withdrawal of all the Vilas County lands from the forest crop law.

In October, 1961, the county advertised for timber sales upon the land in question and other lands.

In November, 1961, the defendant Mutter, as county forester, pursuant to authority from the county board entered into contracts with several individuals for the sale of timber on the lands in question.

Pursuant to timber sales agreements the individuals commenced the cutting and removal of timber. On or about December 20, 1961, agents of the Wisconsin Conservation Department placed confiscation tags on some of the timber that had been cut. On December 24, 1961, the defendant, Mutter, removed eight of the tags and his arrest followed.

It is assumed by the parties that prior to the 1959 amendment to Sec. 77.10(2)(a), (Chapter 195 Laws of 1959), that the county could withdraw lands from the Forest Crop Law without reimbursement to the state of state aids if the purpose of withdrawal was for other than sale. (See 46 O.A.G. 16—1957).

If the purpose of withdrawal was for sale other than to the state or local unit of government the county was required to make reimbursement to the state of moneys received or in case of timber sale a certain percentage of the value of the timber sold. (Sec. 28.12 and 20.280(80) to (85)).

Section 77.10(2)(a) provided that any owner could elect to withdraw lands from forest crop by the payment by the owner, except a county, of taxes that would ordinarily have been assessed. The 1959 amendment added a final sentence to the section, to-wit: "A county may withdraw county-owned lands from this chapter under s. 28.12."

It is the contention of the state that the purpose of the 1959 amendment was to prevent counties from withdrawing their land from the present forest crop without reimbursement to the state, and the amendment now in effect provides that county forest crop lands can be withdrawn only for the purpose of sale under Sec. 28.12, and this amendment is valid.

It is the opinion of the court that it was the intention of the legislature to provide that the county could withdraw lands only for purpose of sale of the land so as to prevent a situation where the state would receive no reimbursement of aids advanced to the county.

The defendant contends that the amendment is unconstitutional in that it is retroactive and cannot impair the obligation of contract between the subdivision and the state itself.

While the defendant here is an individual, he was acting in his official capacity as county forester. It is the county rather than Anthony Mutter individually who has the interest in the basic problem.

As a general proposition the law is clear that a county has no right to challenge the constitutionality of a state statute.

"A county as a quasi-municipal corporation and as an arm of the state has no right to question the constitutionality of the acts of its superior and creator, or of another arm or governmental agency of the state. A county or a governmental agency is created almost exclusively in the view of the policy of the state at large for purposes of political organization and civil administration in matters of state concern." 1 *McQuillin Mun. Corp.* (3rd ed.) PP 311, 497 secs. 1.88, 2.46. *Young* v. *Juneau County* (1927) 192 Wis. 646; 212 N.W. 295.

See also *State ex rel Bare* v. *Schinz* (1927) 194 Wis. 397. *Douglas County* v. *Industrial Commission* (1957) 275 Wis. 313, 314; 81 N.W. (2d) 807.

The stipulation of facts sets forth that the county owned the land in its proprietary capacity. Whether the lands were held in governmental or proprietary capacity is a question of law rather than fact.

Sec. 77.01 sets forth the purpose of the Forest Crop Law:

> "It is the intent of this chapter to encourage a policy of preserving from destruction or premature cutting the remaining forest growth in this state, and of reproducing and growing for the future adequate crops of forest products on lands not more useful for other purposes, so that such lands shall continue to furnish recurring forest crops for commercial use, all in a manner which shall not hamper the towns in which such lands lie from receiving their just tax revenue from such lands."

The preservation and reproduction of forests and forest land is a matter of general public concern affecting the public interest of the state as a whole. When the county voluntarily entered their land in forest crop and accepted the benefits of the act they did in effect recognize and subscribe to the public purposes of the Act. If the county did hold the land in a proprietary capacity before it voluntarily entered it into forest crop land it lost its proprietary capacity as to the land at that time. It cannot accept benefits which were provided for a state wide public concern offered by its creator and then deny the existence of the public purpose and reassert its individual or proprietary interest. The contract was in furtherance of a governmental purpose and the constitutional defense of abrogation of contracts is not available to the county as against the state.

> ". . . neither the impairment-of-contract nor the due-process-of-law provisions of the federal and state constitutions have any application to the act of the legislature in retroactively taking away from the county its right of offset.
>
> "Counties, like other municipal corporations, are mere instrumentalities of the state, and statutes confer upon them their powers, prescribe their duties, and impose their liabilities. *Frederick* v. *Douglas County* (1897), 96 Wis. 411, 417; 71 N.W. 798; and *Commission-*

ers v. *Lucas* (1876), 93 U.S. 108, 114; 23 L. Ed. 822. Because of this, the legislature may, with the consent of the other party, revoke any contract entered into by a county or other municipal corporation in performance of a governmental function, and in so doing there is no violation of the constitutional prohibition against a state taking action to impair the obligation of a contract. This rule is stated in 37 Am. Jur., Municipal Corporations, pp. 699, 700, sec. 89, as follows:

> "'A contract to which a municipal corporation is a party, relating to a public and governmental matter, may, however, be revoked by the legislature with the consent of the other party without thereby violating the right of the municipality.'" *Douglas County* v. *Industrial Comm.* 275 Wis. 309, 313-314; 81 N.W. (2d) 807.

It is the opinion of the court that the amendment to Sec. 77.01(2)(a) is not unconstitutional and that it provides the only method of withdrawal of county forest crop lands and that the defendant did unlawfully remove the seizure tags.

The state also contends that the defendant as an individual cannot raise the constitutional question as a matter of defense to this criminal prosecution. While the court is of the opinion he is entitled to raise such defense a discussion of this issue is not necessary because of the court's opinion that the legislative act is constitutional.

It follows that the motion to dismiss is denied and that the judgment of conviction of the county court is affirmed and reinstated.

Attorneys for the state may draw the necessary order to give effect to this opinion.

Dated June 7, 1963.

BY THE COURT:

(s) Bruce F. Beilfuss
Circuit Judge

APPENDIX D

SECTIONS 77.03, 77.10(2(a) and 28.12, WISCONSIN STATUTES, 1961

"77.03 TAXATION OF FOREST CROP LANDS. From and after the filing of the order with the officers mentioned in subsection (3) of section 77.02 the lands described therein shall be 'Forest Crop Lands,' on which taxes shall thereafter be payable only as hereinafter provided. The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner, running with said lands, for a period of fifty years, unless terminated as hereinafter provided, with privilege of renewal by mutual agreement between the owner and the state, whereby the state as an inducement to owners and prospective purchasers of forest crop lands to come under this chapter agrees that until terminated as hereinafter provided, no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands, except as the conservation commission and the owner may expressly agree in writing. If at the end of fifty years said contract is not renewed by mutual consent, the merchantable timber on said land shall be estimated by an estimator jointly agreed upon by the conservation commission and the owner, and in the event said conservation commission and said owner fail to agree, then and in that event, an estimator shall be appointed by the judge of the circuit court of the district in which said lands lie, whose estimate shall be final, and the cost thereof shall be borne jointly by the conservation commission and the owner; and the ten per cent severance tax paid on the stumpage thereon as agreed in the same manner as if said stumpage has been cut. The owners by such contract consent that the public may hunt and fish on said lands, subject to such regulations as the conservation commission may from time to time prescribe."

SECTION 77.10(2)(a)

"(2) ELECTION TO WITHDRAW LANDS. (a) Any owner of forest crop lands may elect to withdraw all or any of such lands from this chapter, by filing with the conservation commission a declaration withdrawing from this chapter any description owned by him which he specified, and by payment by such owner, other than a county, to the conservation commission within 30 days the amount of all real estate tax that would ordinarily have been charged against such lands had they not been subject to this chapter with simple interest thereon at 5 per cent per annum, less any severance tax and supplemental severance tax or acreage share paid thereon, with interest computed according to the rule of partial payments at the rate of 5 per cent per annum. The exact amount of such tax shall be determined by the department of taxation after hearing and upon due notice to all parties interested, provided that when the tax rate of the current year has not been determined the rate of the preceding tax year may be used. On receiving such payment the conservation commission shall issue an order of withdrawal and file copies thereof with the department of taxation, the supervisor of assessments, the clerk of the town and the register of deeds of the county in which such land lies. Such land shall then cease to be forest crop lands. A county may withdraw county-owned lands from this chapter under s. 28.12."

"28.12 WITHDRAWAL AND SALE OF COUNTY FOREST LANDS. The county board by resolution may authorize withdrawal of county forest lands from entry under the forest crop law and sale to the state or to any local unit of government at an agreed price. In the case of sale to any other purchaser the following provisions shall govern:

"(1) All applications for the purchase of county forest lands shall be addressed or referred to the committee designated by the county board to administer county forests.

"(2) The committee shall advise the conservation commission, which shall provide for an examination and report on the character of the land, the volume of timber and any other special values, and shall set a minimum valuation based on such report. In transmitting its valuation, the commission shall give its recommendations for or against sale of the property.

"(3) Any county board resolution authorizing withdrawal and sale of county forest lands to any purchaser other than the state or a local unit of government shall require a two-thirds vote of the membership of the board and shall instruct the county clerk to publish a notice of sale, listing the lands, the minimum bid, the amount of the payment accompanying the bid and the time and place for opening of bids by the committee designated to administer county forests. In case a successful bidder withdraws his bid the accompanying deposit shall be forfeited to the county.

"(4) When forest crop lands are withdrawn and sold to any purchaser other than the state or a local unit of government, the county shall reimburse the state in the amount previously paid out on the withdrawn lands under s. 20.280(72) and any such receipts shall be credited to the same section.

"(5) In cases of withdrawal of scattered county forest crop lands the conservation commission shall waive reimbursement where it finds that such withdrawal will result in county forest boundaries conforming with best use of the land."